

**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF WISCONSIN**

IN RE: MICHAEL D. SMITH,

Case No. 06-20127

Debtor.

Chapter 13

**MEMORANDUM DECISION SUSTAINING DEBTOR'S OBJECTION
TO CLAIM #2 OF NISSAN MOTOR ACCEPTANCE CORPORATION**

After confirmation, the debtor objected to Nissan's proof of claim. The objection raises two issues: (1) whether a proof of claim or the treatment of that claim in a confirmed plan should control the allowed secured claim in a case where the creditor filed its proof pre-confirmation, had notice of the debtor's proposed treatment of that claim, and did not object to that treatment pre-confirmation; and (2) whether a car acquired for the personal use of the debtor's fiancé is a car acquired for the debtor's "personal use" under the hanging paragraph of 11 U.S.C. § 1325(a) of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA").

Facts

The debtor filed a Chapter 13 petition after October 17, 2005, which makes BAPCPA the applicable governing law. The Form B9I Notice of Chapter 13 Bankruptcy Case, Meeting of Creditors, Hearing on Confirmation and Deadlines went out by first-class mail to creditors—including Nissan Motor Acceptance Corporation ("Nissan")—three days after the petition was filed. That notice informed

creditors that the § 341 meeting of creditors would take place on February 16, 2006.

It also informed creditors of the following:

If a plan has been filed, a copy is enclosed, if not, you will receive it at a later date. If there is no written objection to the plan, the Court may confirm the plan. If a written **objection to confirmation** of the proposed plan is filed no later than ten days after the completion of the Meeting of Creditors, a **hearing** will be scheduled by the Court. The only persons who will be notified of the hearing date will be the trustee, counsel for the debtor (or the debtor if the debtor is not represented by counsel), the Office of the United States Trustee, the objecting party, and all other persons who specifically request in writing to receive notice.

(This is standard language in the Form B9I which goes out to creditors in this district.)

Two weeks before the date scheduled for the meeting of creditors, Nissan filed a fully secured claim in the amount of \$18,006.34. The following day, the debtor filed a document entitled “Amended Chapter 13 Plan.” (This title is misleading—the debtor had not, prior to that date, filed an original plan.) The plan asserted that the vehicle that secured Nissan’s claim was subject to valuation under 11 U.S.C. § 506. The plan stated, “2000 Nissan Xterra - not driven by debtor - Nicole Thompson fiancé.” The plan bifurcated Nissan’s claim, listing the amount of the secured claim at \$11,225.00 and the interest rate at 8.5%. This plan was sent to creditors by first-class mail on February 3, 2006.

The meeting of creditors took place as scheduled on February 16. The trustee’s notes from that meeting indicate that aside from the trustee, only the debtor and his attorney appeared at the meeting. Nissan did not file a written

objection to confirmation of the plan within ten days of that date—or, indeed, at any time. Nor did any other creditor object to confirmation. Accordingly, thirteen days after the meeting of creditors (and three days after the ten days specified in the Form B9I had expired), the Court signed the order confirming the amended plan.

The debtor subsequently objected to Nissan's claim. In his objection, the debtor argued that the claim was subject to bifurcation under § 506 because the collateral securing the claim—the car—was not purchased for the debtor's personal use. Rather, he argued, the car was purchased for his fiancée's sole and exclusive use. He argued that the secured portion of the bifurcated claim should be \$11,225.00 plus 8.5% interest, with the balance of the claim being treated as a general, unsecured claim.

At the hearing on the objection, the Court took testimony from the debtor. He testified that the vehicle in question was purchased for his fiancé, and that he was to co-sign the loan. He stated that he knew when he signed the retail contract that it indicated the vehicle was purchased in his name.

The Chapter 13 trustee took the position at the hearing that Nissan's proof of claim prevailed in regard to the value of the vehicle. In his subsequent brief, however, the trustee asserted that because Nissan did not object to its treatment under the plan at the time of confirmation, Nissan should be bound by the plan.

Discussion

1. Plan vs. Claim

This case raises an omnipresent, chicken-and-egg problem created by the Bankruptcy Code and rules. The problem plagues courts to such an extent that different jurisdictions across the country come out on the problem in different ways, and the Supreme Court has not had occasion to resolve the matter. Nor did Congress clarify the issue when it amended the Bankruptcy Code through BAPCPA. The question is this: if a claim is deemed allowed unless objected to, and a confirmed plan is binding on all parties, what happens when the claim and the plan are at odds? Under the circumstances of this case, the answer is that the confirmed plan controls.

a. Relevant Procedural Posture

It is important to note the procedural posture of the case before the Court. Nissan received notice that the debtor had filed for Chapter 13 protection within days of the date the petition was filed. It timely filed a proof of claim prior to the meeting of creditors, and prior to the date the Court confirmed the debtor's plan. It received a copy of the plan, which clearly articulated a proposal both to bifurcate, or "cram down," Nissan's claim, and to value the amount of its secured claim differently—to the tune of almost \$7,000—than the amount stated in the proof of claim. The plan specifically stated the exact dollar amount the debtor proposed to pay as Nissan's allowed, secured claim. Nissan did not file a written objection to

confirmation of the plan. The plan was confirmed, and the debtor then objected to the amount listed in Nissan's proof of claim.

Accordingly, the narrow question before this Court is, in a case in which:

- * the creditor files a proof of claim prior to the meeting of creditors and prior to confirmation;
- * the debtor proposes a plan that treats the claim differently than the proof of claim, and serves that plan on the creditor;
- * the creditor does not object to that plan prior to confirmation; and
- * the Court confirms the plan without objection,

whether the amount listed in the proof of claim or the amount listed in the confirmed plan constitutes the amount of the allowed, secured claim.

b. The Applicable Statutory Sections and Rules

The analysis starts with § 502(a) of the statute, which states that a claim is “deemed allowed” unless a party in interest objects to the claim. Fed. R. Bankr. P. 3002(a) states that “[a]n *unsecured creditor* or an *equity security holder* must file a proof of claim or interest for the claim or interest to be allowed,” but is silent regarding holders of secured claims.¹ If filed, however, a proof of claim, under Bankruptcy Rule 3001(f), is *prima facie* evidence of a claim's validity and value. Thus, read alone, § 502 dictates that a claim is deemed allowed for as long as no

¹ At least one bankruptcy court has opined that, “as a practical matter, a secured creditor must file a claim to participate in and receive dividends or other distributions under a Chapter 13 plan.” *In re Strong*, 203 B.R. 105, 112 (Bankr. N.D. Ill. 1996). This is because an “allowed” claim under § 502 is “[a] claim or interest, proof of which is filed under section 501” 11 U.S.C. § 502. *Id.*

party objects to that claim.

Section 502 does not articulate a time limit by which an interested party must object to a claim, nor does Fed. R. Bankr. P. 3007, the rule governing objections to claims. Conceivably, then, a party in interest could object to a claim at any point until the moment a court either dismisses the case or orders that the discharge be entered.

The next relevant statutory provision for Chapter 13 purposes is § 1327(a), which states that “[t]he provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected, has accepted, or has rejected the plan.” Under § 1327, then, once a court confirms a plan, that confirmed plan binds both the debtor and the creditor.

Perhaps there would not be a disconnect between these two provisions were it not for a timing problem. Fed. R. Bankr. P. 3015(b) allows a debtor to file his plan on the day he files his petition. If the debtor does not file the plan with the petition, Rule 3015(b) requires him to file his Chapter 13 plan no later than fifteen (15) days after he files the bankruptcy petition. Rule 3002(c), however, says that non-governmental creditors’ claims are timely filed if they are filed no later than *90 days after the date first set for the meeting of creditors*—required, by Rule 2003, to take place between 20 and 50 days after the filing of the petition in a Chapter 13 proceeding. Thus, the debtor must file a plan explaining how he proposes to treat

the creditor's claim some three to four-and-a-half months before the deadline for the creditor to file the proof of claim. Conversely, at the point in time at which the debtor is required to file his plan, "it is unlikely . . . that creditors have even contemplated filing proofs of claims." In re Simmons, 765 F.2d 547, 552 (5th Cir. 1985).

Making matters worse is § 1324 of the Bankruptcy Code, which requires that confirmation hearings on plans must be held no later than 45 days after the meeting of creditors. When one reads this provision in conjunction with Rule 3002(c), it becomes clear that confirmation hearings must take place forty-five days *before* the deadline for creditors to file their claims. As the Seventh Circuit has noted, there is no statute or rule requiring a creditor to file a proof of claim prior to confirmation. In re Hovis, 356 F.3d 820, 822 (7th Cir. 2004).

This odd timing issue, coupled with the fact that there is no time limit by which parties must object to claims, creates the problem with which bankruptcy courts, trustees and practitioners struggle. The creditor files a proof of claim to which no one objects, and under § 502, it is deemed allowed because no one objected to it. The debtor files a plan and no one objects, so the court confirms the plan and that plan becomes binding on the creditor. If the amount listed in the proof of claim—which is deemed allowed—is different from the amount listed in the confirmed plan—which is binding on the creditor—which amount constitutes the allowed, secured claim which the trustee must pay?

c. Seventh Circuit Law

Over the last seventeen years, the Seventh Circuit has spoken several times on this issue. Its decisions are instructive.

i. Pence

In Matter of Pence, 905 F.2d 1107 (7th Cir. 1990), the creditor held first and second mortgages on the debtor's business and residential properties, and a pledge of all debtor's inventory, equipment, and accounts. The debtor proposed a Chapter 13 plan that provided for the creditor to receive collateral in exchange for release of the mortgages on the debtor's residential property. At the confirmation hearing, the debtor presented evidence showing that the appraised value of the collateral far exceeded the debt owed to the creditor. The creditor did not contest the valuation or object to the plan, and the court confirmed the plan. Later, it became clear that the collateral actually was worth less than what the debtor owed. The creditor asked the court to revoke the confirmation order and lift the stay. Id. at 1108.

In support of its request, the creditor argued that it did not receive written notice of the confirmation hearing. The bankruptcy court found otherwise. The Seventh Circuit found that it was irrelevant whether the creditor had notice of the confirmation hearing:

. . . even assuming that [the creditor] failed to receive written notice of the confirmation hearing, it is still not entitled to avoid the binding effects of the reorganization plan. Due process does not always require formal, written notice of court proceedings; informal actual notice will suffice. In this case, [the creditor], a sophisticated and organized creditor, had knowledge of [the debtor's] bankruptcy petition and

should have known that a reorganization plan would have to be filed within fifteen days of the petition. *See* BANKR. RULE 3015.

Creditors, especially lending institutions like [the creditor in the case], must follow the administration of the bankruptcy estate to determine what aspects of the proceeding they may want to challenge. *See In re Torres*, 15 Bankr. 794, 797 (Bankr. E.D.N.Y. 1981); *see also In re Sam*, 894 F.2d 778 (5th Cir. 1990) (tort claim barred by bankruptcy discharge where claimant knew of bankruptcy case and could have taken action to protect his rights). [The creditor] was not entitled to stick its head in the sand and pretend it would not lose any rights by not participating in the proceedings.

Id. at 1109.

The creditor in Pence urged the Seventh Circuit to follow a line of cases “where courts have refused to allow a reorganization plan to alter the rights of a lienholder.” Id. at 1110. (This line of cases included the Fifth Circuit case of In re Simmons, 765 F.2d 547 (5th Cir. 1989), a case cited by Nissan in the instant case.) The debtor, on the other hand, urged the Seventh Circuit to “hold that whenever the bankruptcy court has confirmed a chapter 13 plan, its provisions are always binding on a secured creditor’s lien.” Id.

The court declined to go to either extreme. Rather, it noted that the case before it involved a plan that treated “the secured claim in a fair and equitable manner, providing for full payment of the debt.” The court noted that the creditor was, in effect, “now trying to challenge the valuation given to its collateral in [the debtor’s] chapter 13 plan.” The court concluded that, “instead of attacking the valuation head-on at the confirmation hearing, [the creditor] has chosen a collateral attack on the confirmation order where valuation may not be contested, *see* 11

U.S.C. § 1330(a) (listing fraud as the only basis for revocation of confirmation. . . . [the creditor] must live with its procedural choice.” Id.²

ii. Harvey

Ten years later, the court revisited the principles of Pence in In re Harvey, 213 F.3d 318 (7th Cir. 2000). In Harvey, the debtor attached two documents to her Chapter 13 petition. The first document was a “long form plan” that provided for the creditor's lien to be extinguished as soon as the debtor had paid the secured amount in accordance with plan; the remaining debt would then become unsecured. The second document was a “short form plan” that did not provide for lien-stripping. The creditor did not object, and the bankruptcy court confirmed the plan. Id. at 319-320.

Sixteen months later, the creditor objected for the first time when the debtor proposed to modify her confirmed plan to reduce her weekly payments. The creditor argued that lien-stripping should not be allowed over a creditor’s objection. The Seventh Circuit noted that “[i]t is a well-established principle of bankruptcy law that a party with adequate notice of a bankruptcy proceeding cannot ordinarily attack a confirmed plan.” Id. at 321, citing 11 U.S.C. § 1327(a). In response, the creditor argued that by filing two plans, the debtor created such an ambiguity that

² See also, Matter of Chappell, 984 F.2d 775, 782 (7th Cir. 1993) (creditor’s failure to assert § 506(b) interest claim prior to confirmation barred it from asserting the claim in a subsequent foreclosure action. “As a general rule, the failure to raise an ‘objection at the confirmation hearing or to appeal from the order of confirmation should preclude . . . attack on the plan or any provision therein as illegal in a subsequent proceeding.’”).

the court should trump this principle of repose and construe the plans against the debtor. Id.

_____The Seventh Circuit disagreed with the creditor for one succinct reason—the creditor “failed to lodge a proper objection to the existence of the two plans before the bankruptcy court acted [to confirm].” Id. at 322. The court concluded that, “If GMAC was genuinely uncertain about the combined effect of the short and long forms (a total of four pages), it was obligated to raise this issue with the bankruptcy court prior to the original plan confirmation.” Id.

In support of this conclusion, the court gave the following reasoning:

Forcing parties to raise concerns about the meaning of Chapter 13 filings at the original confirmation proceedings does not impose an unreasonable burden on bankruptcy participants. Quite the contrary—it is perfectly reasonable to expect interested creditors to review the terms of a proposed plan and object if the terms are unacceptable, vague or ambiguous. As this court said in In re Pence, 905 F.2d 1107, 1109 (7th Cir. 1990), a creditor is “not entitled to stick its head in the sand and pretend it would not lose any rights by not participating in the proceedings.” See also, In re Anderson, 179 F.3d 1253, 1257 (10th Cir. 1999) (“A creditor cannot simply sit on its rights and expect that the bankruptcy court or trustee will assume the duty of protecting its interests.”); In re Szostek, 886 F.2d 1405, 1414 (3rd Cir. 1989) (stating that creditors must take an active role in protecting their rights).

Id.

Finally, the court noted that it “did not mean to suggest that a party may never claim in a subsequent proceeding that a provision of a Chapter 13 plan is ambiguous and should be read one way or another.” Id. at 323. The court agreed that parties to bankruptcy confirmation proceedings could not foresee every possible

problem that could arise in the construction of a particular plan provision. But in the case before it, the court found that “the ambiguity about which [the creditor] was complaining was one that was readily identifiable during the original confirmation proceedings.” *Id.* Accordingly, the Seventh Circuit reversed the dismissal of the debtor’s case.

iii. Adair

Pence and Harvey both involved creditors who failed to object to confirmation of plans. A few months after deciding Harvey, the Seventh Circuit looked at the other side of the coin—the debtor who failed to object to a claim prior to confirmation. In Adair v. Sherman, 230 F.3d 890 (7th Cir. 2000), the debtor’s plan provided that allowed secured claims would be paid in full—including a loan secured by a car. Subsequently, the creditor filed a proof of claim which listed the value of the car at some \$3,500 more than the original purchase price. The debtor did not object to the claim prior to confirmation. The plan was confirmed, allowing the creditor’s claim as fully secured. Nine months later, the debtor filed an adversary proceeding challenging the value listed in the creditor’s proof of claim. The Chapter 13 matter ended up being dismissed, and with it, the adversary. *Id.* at 893.

The debtor then filed a Fair Debt Collection Practices Act (“FDCPA”) complaint against the creditor’s counsel, arguing that the firm routinely and fraudulently overvalued collateral in its proofs of claim. The district court dismissed the FDCPA claim, finding that it was barred by claim preclusion (res

judicata). Id.

The Seventh Circuit affirmed the dismissal, although it found that rather than being barred by claim preclusion, the FDCPA claim was barred by collateral estoppel (issue preclusion). Id. In particular, the court noted,

[The debtor] had notice of the proof of claim prior to confirmation, but he chose not to object to it. “As a general rule, the failure to raise an objection at the confirmation hearing or to appeal from the order of confirmation should preclude attack on the plan or any provision therein as illegal in a subsequent proceeding.”

Id. at 894, quoting Matter of Chappell, 984 F.2d 775, 782 (7th Cir. 1993). The court noted that it had refused relief to the creditor who sat on its hands in Pence, and observed that the Tenth, Fourth, Eleventh, Third and Ninth Circuits “share our view that once a bankruptcy plan is confirmed, its terms are not subject to collateral attack.” Id. (citations omitted).

Accordingly, the court concluded that,

when a proof of claim is filed prior to confirmation, and the debtor does not object prior to confirmation, the debtor may not file a post-confirmation collateral action that calls into question the proof of claim. See [In re] Justice Oaks [II, Ltd.], 898 F.2d [1544] at 1553 [(11th Cir.), cert. denied, 498 U.S. 959 . . . (1990)] [*cert. denied sub nom.*, Wallis v. Justice Oaks II, Ltd., 498 U.S. 959 (1990)]; [In re] Ross, 162 B.R.[785] at 789 [(Bankr. N.D. Ill. 1993)] (“The law is well settled that a confirmation order is res judicata as to all issues decided or which could have been decided at the hearing on confirmation.”) Allowing collateral attacks of the type brought by [the debtor] would give debtors an incentive to refrain from objecting in the bankruptcy proceeding and would thereby destroy the finality that bankruptcy confirmation is intended to provide.

Id. at 894-895 (notes omitted).

In footnotes, the Adair court addressed a couple of related issues. First, it clarified the fact that it was not addressing the situation in which a creditor filed a proof of claim after confirmation, noting, “We address only the situation in which the creditor filed a proof of claim before confirmation and the debtor had enough time to formulate an objection prior to confirmation.” Id. at 895 n.4. Second, the court acknowledged that “[t]here has been some tension in bankruptcy court cases as to whether debtors are required to object to proofs of claims prior to confirmation. See In re Simmons, 224 B.R. 879, 883-884 (Bankr. N.D. Ill. 1998) (noting cases).” The Seventh Circuit, however, “respectfully [chose] not to follow those cases allowing post-confirmation objection to proofs of claim to be filed even though the proof of claim itself was filed sufficiently in advance of the confirmation hearing.” Id. at 895, n.6 (citation omitted).³

iv. *The Combined Effect of the Three Cases*

Taken together, the Pence, Harvey and Adair decisions mandate that a creditor who has adequate pre-confirmation notice of how the debtor intends to treat its claim, but does not object to that treatment pre-confirmation, is bound by the terms of the confirmed plan.

³ In In re Hovis, 356 F.3d 820 (7th Cir. 2004), the court held that its decision in Adair did not prevent a debtor in a Chapter 11 matter from objecting to a creditor’s claim post-confirmation. The confirmed plan in Hovis provided that the debtor had to object to claims no later than 60 days after the effective date of the plan. Because that provision did not contravene any statute or rule, and because the debtor had objected to the claim within that time period, the Seventh Circuit held that the bankruptcy court should have allowed the debtor to prosecute his objection.

d. Nissan's Arguments

In spite of the Seventh Circuit cases described above, Nissan advances a number of arguments in support of its contention that this Court should hold that the proof of claim controls under the circumstances of this case. The Court will address these arguments in turn.

i. *"The Creditor Knows Best"*

Nissan first argues that there is a logical reason for the creditor's proof of claim, rather than the confirmed plan (created by the debtor) to control—the creditor is in the better position to know the true amount of its claim. The creditor keeps records of the principal and interest balances, while debtors rarely keep such records. The creditor is more likely to have proof to support the value of the claim. Thus, the creditor argues, it makes practical sense to have the claim control.

From a factual standpoint, Nissan likely is correct. Indeed, at the hearing on the debtor's objection in this case, counsel for the standing Chapter 13 trustee expressed this same view. Lawyers and judges in the consumer bankruptcy area routinely deal with debtors who believe they have made payments that in fact have not been made. They deal with debtors who do not know the interest rates on their loans. They deal with debtors who do not recall the original loan amount, and no longer have the documentation which reflects that amount. While creditors are not perfect in their record-keeping, the Court agrees that they are more likely than debtors in most instances to have an accurate record of the balance due on the

secured claim.

But this fact is irrelevant to the question of whether the plan or the claim should control. If the creditor had no opportunity to object to the claim treatment that a debtor lists in his proposed Chapter 13 plan, then this argument might have some traction. But creditors *do* have the opportunity to object when they believe that debtors incorrectly have treated secured debts—they can object to confirmation of the plan. If, as Nissan argues, creditors are in a better position to know the true balance on the secured debts than are debtors, then they should make every effort to, as Judge Wood stated in Pence, “follow the administration of the bankruptcy estate to determine what aspects of the proceeding they may want to challenge.” Matter of Pence, 905 F.2d at 1109. In other words, they should object.

ii. *The Creditor Bears the Risk*

Nissan also implies that creditors are at a higher risk if they make errors in completing and filing their proofs of claim than are debtors who make mistakes in designing and filing their plans. Nissan says that, pursuant to 18 U.S.C. §§ 152 and 3571, creditors can be fined up to \$500,000 and imprisoned up to five years for presenting a fraudulent claim. In contrast, Nissan argues, bankruptcy rules allow debtors to amend their plans and schedules without impunity.

The Court confesses puzzlement with this argument. Nissan implies that there is some law that punishes creditors, and creditors only, for presenting fraudulent information. But § 152 of Title 18 (the criminal code) makes it a crime

for “[a] person”—*any* person—to fraudulently conceal assets from creditors or the trustee, make false oaths or accounts in bankruptcy cases, present false claims, and fraudulently transfer or conceal property, among other things.⁴ Section 152 does not apply solely to creditors—it applies to *anyone* who commits a criminal fraud in a bankruptcy matter. If a debtor knowingly commits a criminal fraud, that debtor is just as subject to criminal prosecution and punishment as is a creditor.

Further, Nissan argues that “debtors are permitted to make amendments to their plan or schedules and are not typically held in contempt or subject to other sanctions for *mistakes* in the plan and/or schedules. Creditors are warned that the penalty for presenting a *fraudulent* claim is a fine of up to \$500,000 or imprisonment for up to five (5) years, or both.” (Emphasis added.) “Mistakes” and “fraud” are two very different things. Section 152 is a *criminal* statute. In order to be convicted of violating a *criminal* statute, one must possess a certain *criminal* intent. Nissan is absolutely right that debtors are not subject to *criminal* sanctions for making mistakes in their schedules or plans. Nor would a creditor be subject to *criminal* sanctions for making a mistake in its proof of claim. On the other hand, a debtor who *knowingly* commits *fraud* would be liable for criminal sanctions—just as a creditor who *knowingly* commits *fraud* would be liable for criminal sanctions.

In short, the Court finds nothing persuasive in this argument.

⁴ Section 3571 of Title 18 is not a substantive provision—it merely prescribes the possible penalties for violation of 18 U.S.C. § 152.

iii. *Procedures in the Eastern District*

Nissan next urges the Court to consider the procedures for claims allowance and plan confirmation in this particular district, arguing that those procedures mandate that the claim control.

When a debtor files a Chapter 13 petition in this district, the clerk's office sends out the Form B9I to all of the creditors listed in the debtor's schedules. This is how the creditors learn that the debtor has filed. It is also the document that informs creditors of the date scheduled for the § 341 meeting of creditors. As discussed above, the form clearly indicates to the creditors that if they file a written objection to the plan within ten (10) days of the completion of the meeting of creditors, the court will schedule a hearing on that objection.

The debtor may file his plan with the petition or, as the Federal rules permit, no later than fifteen (15) days after the petition is filed. The Eastern District has a model Chapter 13 plan, but it is not mandatory that debtors use it. Rather, Local Rule 3015.1 indicates that a debtor's plan must "substantially conform" to the model Chapter 13 plan. Once the debtor files his plan, the plan is sent out to all of the creditors listed in his bankruptcy petition and schedules. The trustee also receives a copy of the plan.

Next comes the meeting of creditors. These meetings are scheduled, as required by Fed. R. Bankr. P. 2003, between 20 and 50 days after the debtor files his Chapter 13 petition. In some cases, the meeting begins and ends on the first

scheduled date. In other cases, the meeting is adjourned for one reason or another.

Upon completion of the meeting of creditors, a creditor has ten (10) days to submit a written objection to the plan if it wishes the court to hold a hearing on its objection. If a creditor submits a written objection, the trustee does not recommend confirmation to the court until that objection has been resolved. If, on the other hand, no creditor objects (and, of course, the trustee has no objection), the trustee submits the plan to the court with a recommendation that it be confirmed and a proposed order of confirmation.

Unlike other districts, the Eastern District of Wisconsin does not hold confirmation hearings under § 1342. As the creditor points out, “[c]onfirmation typically occurs as an administrative task after the [meeting of creditors], and upon the report and recommendation of the Chapter 13 Trustee, assuming, of course that there are no objections to confirmation on file.” Creditor’s Brief at p. 5.

Finally, there is no local rule in the Eastern District requiring debtors to object, pre-confirmation, to proofs of claim filed pre-confirmation, as there is in some other districts.

Nissan argues that these procedures dictate that the claim must control. The Court disagrees. In the case at bar, once Nissan had the Form B9I notice and the debtor’s plan, it had at its disposal all of the information it needed, from a timing perspective, to protect its rights. It had the plan in hand, so it knew—specifically, to the dollar—how the debtor proposed to treat its claim. It knew the date set for the

meeting of creditors, and while few creditors take advantage of this opportunity, it certainly could have appeared at that meeting. It knew that if it wanted a hearing on the way the debtor proposed to treat its claim, it needed to file a written objection within ten days of the completion of that meeting.

Nissan did not take any action to protect its rights prior to confirmation, and yet now it argues that its proof of claim, and not the confirmed plan, should control. It implies that because this district does not hold confirmation hearings—in-court hearings where creditors can appear and argue out their claims issues with debtors and trustees—the claim should control. But the Seventh Circuit in Pence found that the confirmed plan controlled even if the creditor, in a district which holds confirmation hearings, did not get notice of that hearing. Nissan, like the creditor in Pence, is a “sophisticated and organized creditor” who “had knowledge” of the debtor’s bankruptcy and “should have known that a reorganization plan would have to be filed within fifteen days of the petition.” Pence, 905 F.2d at 109. Nissan also had notice of when it needed to file a written objection to that reorganization plan in order to obtain a hearing on that objection. The absence of a formal confirmation hearing, therefore, does not deprive Nissan—or any other creditor—of the opportunity to have its objections to a plan heard by a court.

Nissan tries to distinguish the holdings in Adair and Chappell by arguing that the districts in which those cases arose had different procedures for the claims allowance and plan confirmation processes. Having read those decisions, as well as

the decisions in Pence and Harvey, the Court cannot find any basis for this distinction. Pence and Harvey were appeals from the Northern District of Indiana. Adair was an appeal from the Northern District of Illinois. The Seventh Circuit did not base these decisions on the particular procedures or practices of each district. It based its decisions on its reading of the Bankruptcy Code and rules. There is nothing in those decisions to indicate that they somehow do not apply in the Eastern District under the factual circumstances present in this case.

iv. *Local Rules in the Eastern District*

In a similar argument, Nissan claims that the local rules for the Eastern District require that the claim control. The Eastern District revised its local rules in March 2006.

Local Rule 3001.1 states, “A secured claimant seeking interest to be paid by the trustee during the term of the plan shall state in the proof of claim the secured portion of the principal balance and an appropriate simple interest rate on the claim. If the proof of claim does not set forth an interest rate, the interest rate in the plan shall control.” Section 7 of the Model Chapter 13 Plan for this district states, “Failure to object to this plan deems acceptance of the plan except to the extent of an allowed secured claim.” Paragraph 13 of the debtor’s plan in the current case contained this language.

The creditor argues that this language proves that the claim, and not the confirmed plan, controls in this district. The Court concedes that both the language

of the Local Rule and the language in the model plan could be read in such a way as to lull a creditor into believing that as long as a debtor did not object to its claim, its claim would be allowed regardless of the plan treatment. But if one of this Court's local rules, or a provision in its model plan, conflicts with the Seventh Circuit's established law in a particular circumstance, then the established law must prevail. As discussed above, the Seventh Circuit has held that a creditor with notice who fails to object pre-confirmation is bound by the terms of the plan.

v. *Unnecessary Objections*

Nissan argues that the very fact that debtors object to proofs of claim in the Eastern District demonstrates that the claim controls. If, Nissan asks, a debtor could defeat a creditor's claim simply by putting whatever amount it chose into the plan, hoping the creditor wouldn't object, and then having the plan confirmed, why would a debtor ever need to object to the proof of claim? Looking at it from the other direction, Nissan asks, if the debtor can just put whatever he wants to into the plan and if the plan controls, why should a creditor ever bother to file a proof of claim?

With regard to Nissan's first question, the Court notes that there are other players involved in the Chapter 13 process besides the debtor and the creditor. Specifically, there is a trustee involved. A debtor who believes that the plan controls may nonetheless object to a creditor's claim to make certain that the trustee will make distributions according to the plan, and not according to the

claim. Further, some plans are not as specific as the one involved in this case, and in those cases, the confirmed plan may not resolve issues of treatment or valuation of claims and thus may require the debtor to object.

As to why creditors should file proofs of claim if the plan controls, it seems there would be at least a couple of reasons. First, as noted above, an “allowed” claim under § 502 is one that has been filed under § 501. Thus, if a creditor wants to have a claim allowed, it might be wise for that creditor to file the claim. Second, as Nissan itself argues, the creditor is likely in the better position to know the correct amount of the claim balance, and filing a proof of claim gives the debtor an opportunity to include the correct balance in his plan.

Nissan argues that ruling that the plan controls would create a world where debtors could put any value they chose into a plan and fail to send that plan to creditors. Then, when the plan got confirmed without objection, the debtors would have deprived creditors of their rights without ever having given them an opportunity to be heard. This imagined scenario does not take into account several facts. Again, it fails to take into account the trustee—the ombudsman-like player in the bankruptcy process. Few trustees would heartily recommend confirmation of plans if it became clear that those plans had not been provided to the creditors. It fails to take into account the existence of courts, few of whom likely would look kindly on debtors who deliberately “forgot” to serve their plans on creditors in the hopes of avoiding confirmation objections.

Finally, it does not take into account that it is often in the debtor's interest to battle out claims differences earlier rather than later. Take that unscrupulous debtor who "forgets" to send the creditor a copy of a plan that treats the creditor's claim differently than it is treated in the proof of claim. At some point, the creditor will realize what has happened, and will come into court seeking redress. That point may come after the debtor has paid into a plan for six months, or a year, or three years. For a debtor to make an investment into a plan only to see it fall apart because he inappropriately deprived the creditor of the opportunity to object is unlikely to inure to the debtor's benefit. He may get to keep the car for another year, but eventually he will lose both the car *and* the money he has paid into the plan—and will be right back where he started before he filed his petition.

vi. *The Practice in This District*

Nissan states definitively that the plan does not control in this district. It states, "[The plan] has never controlled in the Eastern District of Wisconsin. It only follows that the plan should not control in the future."

This Court cannot say whether the plan has "never" controlled in this district. The trustee indicates in his brief that, "generally an amount provided in a proof of claim prevails over a plan in this district." The Court is aware of anecdotal evidence indicating that, after the Seventh Circuit issued its decision in Harvey, the Eastern District experimented with different procedures to deal with the results of that decision. But this Court has no personal knowledge of whether there has ever been

a formal policy that the plan controls in the Eastern District, and if so, whose policy that might have been.

At least one judge in this district, however, has found the plan to control under certain circumstances. In both In re Schultz, no. 06-24781, 2007 Bankr. WL 128827 (Bankr. E.D. Wis. Jan. 16, 2007) and In re Westenberg, no. 03-21749, 2007 Bankr. WL 962932 (Bankr. E.D. Wis. Mar. 30, 2007), Chief Judge Margaret D. McGarity held that confirmed plans controlled in cases where creditors had not objected to those plans pre-confirmation. This Court's decision, then, is not without precedent.

Nissan also argues that, because it has been the practice in this district for the claim to control, it is unfair for the Court to "change rules mid-stream." It argues in its brief that creditors and debtors in this district

have been operating under one playbook and with one set of rules . . . which provide that the proof of claim controls over even a confirmed plan. The debtors know this and they review proofs of claim as they are filed and file objections to claim where necessary. The creditors know this and file supporting documents with their proofs of claim and don't scrutinize plans with a fine-tooth comb.

Nissan's brief at p. 9. Nissan argues that to change the practice at this stage would "deny the creditors of the due process requirement of adequate notice of a significant change in the rules." Id. at p. 12.

The Court fails to see the unfairness Nissan describes. The Seventh Circuit decided Pence in 1990. It decided Harvey and Adair in 2000. Those cases have been governing law in the Seventh Circuit—which includes the Eastern District—ever

since. Those cases provide ample warning that, at least in the Seventh Circuit, a creditor with notice would be well-served to object to an offensive plan prior to confirmation.

vii. *Burden on the Court*

Nissan's penultimate argument is that if the Court determines that the confirmed plan, and not the claim, controls under the circumstances of this case, "[m]any confirmations will become contested matters and plans will be left unconfirmed while valuation and interest matters are fought out before the ever-busy courts. Not only will this delay payment of all claims (aside from the payment of pre-confirmation adequate protection payments), but it will also delay the payment of debtors/attorney's fees."

Perhaps Nissan's dire predictions will come to pass. Perhaps counsel for creditors and debtors will seek to find ways to avoid the parade of horrors Nissan envisions resulting from the Court's decision. Regardless of the outcome, however, this Court is bound by the Seventh Circuit's decisions, regardless of what practical result that law may yield.

viii. *Untimely Debtor's Objection*

Finally, as an alternative argument in the event that the Court rules against it, Nissan argues that the debtor is barred from objecting to its claim under the ruling in Adair. The Adair court held that, "when a proof of claim is filed prior to confirmation, and the debtor does not object prior to confirmation, the debtor may

not file a post-confirmation collateral action that calls into question the proof of claim.” Adair v. Sherman, 230 F.3d 890, 894-895 (7th Cir. 2000) (citations omitted).

The debtor’s objection in this case does not constitute a “collateral action”—he has raised this objection in the same case. Because the Court has ruled that, under these circumstances, the confirmed plan controls, his objection may be unnecessary, but it is not barred by the Seventh Circuit’s decision in Adair.

e. Conclusion

The Court notes that Nissan has not argued that the debtor’s plan violated the mandatory provisions of 11 U.S.C. § 1322(a).⁵ Thus, there is no need for this Court to opine on the controlling effect of a plan whose terms do not comply with the requirements of § 1322(a). Nor need the Court opine on the controlling effect of a plan which does not clearly describe how it proposes to treat a creditor’s claim, or a situation in which a creditor files a proof of claim after confirmation. This Court’s ruling applies to the factual scenario in the case before it: the case where the creditor filed its proof of claim pre-confirmation, the debtor filed a plan which clearly laid out how it proposed to treat and value the creditor’s claim, the creditor had notice of that treatment and the means by which to object to it, and the creditor did not object pre-confirmation. Under these circumstances, the confirmed plan controls.

⁵ See Matter of Escobedo, 28 F.3d 34, 35 (7th Cir. 1994), holding that confirmation of a plan which did not comply with the mandatory provisions of § 1322(a) was “nugatory.”

2. *“Personal Use”*

The debtor’s objection to Nissan’s claim indicated that Nissan’s claim was “subject to 506 due to the [collateral] not being for the personal use of the debtor.” Section 506 of the Bankruptcy Code governs the determination of the secured status of claims. Section 506 allows for claims to be “bifurcated” into secured and unsecured portions.

When Congress amended the Code in 2005 through BAPCPA, it added a new, un-numbered provision to § 1325(a), the provision governing confirmation of plans. Because it has no number, that provision now has come to be known by many bankruptcy folk as “the hanging paragraph” of § 1325.

The hanging paragraph states, in pertinent part:

For purposes of paragraph (5), section 506 shall not apply to a claim described in that paragraph if the creditor has a purchase money security interest securing the debt that is the subject of the claim, the debt was incurred within the 910-day [sic] preceding the date of the filing of the petition, and the collateral for that debt consists of a motor vehicle (as defined in Section 30102 of title 49) acquired for the personal use of the debtor. . . .

Thus, if a creditor has a purchase money security interest in a car that the debtor acquired for his personal use within the 910 days preceding the filing of the bankruptcy, the debtor cannot bifurcate that claim into secured and unsecured portions.

Since the passage of BAPCPA, a number of courts have examined the

language of this paragraph as it relates to various fact situations.⁶ A few of these courts have looked at the language “acquired for the personal use of the debtor.” One court found that the debtor’s “personal use” did not include use by a non-debtor wife. In re Jackson, 338 B.R. 923 (Bankr. M.D. Ga. 2006). Another court found that the phrase could not reasonably be stretched to include a vehicle acquired for the use of an independent adult child who did not live with the debtor. In re Lewis, 347 B.R. 769 (Bankr. D. Kan. 2006). Yet another court held that the vehicle must also be used for non-business purposes to qualify as "personal use." In re Lowder, no. 05-44802, 2006 Bankr. WL 1794737 (Bankr. D. Kan. June 28, 2006).

The Court need not reach that issue here. The debtor’s plan clearly indicated that it was subjecting Nissan’s claim to valuation under 11 U.S.C. § 506. The plan clearly stated that the vehicle was for the personal use of the debtor’s fiancé. Nissan had notice of these provisions, and did not object prior to confirmation. As the Court held above, the provisions now are binding on Nissan.

⁶ See, e.g., In re Brown, 339 B.R. 818, 820 (Bankr. S.D. Ga. 2006); In re Bufford, 343 B.R. 827 (Bankr. N.D. Tex. 2006); In re Brooks, 344 B.R. 417 (Bankr. E.D.N.C. 2006); In re Montoya, 341 B.R. 41 (Bankr. D. Utah 2006); In re Horn, 338 B.R. 110 (Bankr. M.D. Ala. 2006); In re Johnson, 337 B.R. 269 (Bankr. M.D.N.C. 2006); In re Jackson, 338 B.R. 923 (Bankr. D. Ga. 2006); In re Ezell, 338 B.R. 330 (Bankr. E. D. Tenn. 2006); In re Carver, 338 B.R. 521 (Bankr. S.D. Ga. 2006).

Conclusion

WHEREFORE, the Court hereby SUSTAINS the debtor's objection to claim #2 of Nissan Motor Acceptance Corporation. The value of the vehicle is that set forth in the confirmed plan - \$11,255.00 plus 8.5% interest.

SO ORDERED this 29th day of May, 2007.

HON. PAMELA PEPPER
United States Bankruptcy Court

Cc: Michael D. Smith
Debtor

Arnold F. Lueders III
Brett J. Pfeiffer
Counsel for the Debtors

Maria S. Lazar
Counsel for Nissan Motor Acceptance Corp.

Thomas J. King
Standing Chapter 13 Trustee